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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/782,320	02/13/2001	Bernhard H. van Lengerich	BVL-102A	9819

7590                    03/17/2003

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[REDACTED] EXAMINER

WEBMAN, EDWARD J

ART UNIT	PAPER NUMBER
1617	[REDACTED]

DATE MAILED: 03/17/2003

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Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No.	09/782 320		Applicant(s)	VAN LENG ERICH
Examiner	WEBMAN		Group Art Unit	1617

**—The MAILING DATE of this communication appears on the cover sheet beneath the correspondence address—**

### **P r i o r Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, such period shall, by default, expire SIX (6) MONTHS from the mailing date of this communication .
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).

### **Status**

- Responsive to communication(s) filed on 11/18/02.
- This action is FINAL.
- Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 1 1; 453 O.G. 213.

### **Disposition of Claims**

- Claim(s) 25 - 90 is/are pending in the application.
- Of the above claim(s) 26, 41, 43-45, 47-51, 53, 68, 71, 72, 74, 77-90 is/are withdrawn from consideration.
- Claim(s) \_\_\_\_\_ is/are allowed.
- Claim(s) 25, 27-40, 42, 46, 52, 54-67, 69, 70, 73, 75, 76 is/are rejected.
- Claim(s) \_\_\_\_\_ is/are objected to.
- Claim(s) \_\_\_\_\_ are subject to restriction or election requirement.

### **Application Papers**

- See the attached Notice of Draftsperson's Patent Drawing Review, PTO-948.
- The proposed drawing correction, filed on \_\_\_\_\_ is  approved  disapproved.
- The drawing(s) filed on \_\_\_\_\_ is/are objected to by the Examiner.
- The specification is objected to by the Examiner.
- The oath or declaration is objected to by the Examiner.

### **Priority under 35 U.S.C. § 119 (a)-(d)**

- Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d).
- All  Some\*  None of the CERTIFIED copies of the priority documents have been received.
- received in Application No. (Series Code/Serial Number) \_\_\_\_\_.
- received in this national stage application from the International Bureau (PCT Rule 17.2(a)).

\*Certified copies not received: \_\_\_\_\_.

### **Attachment(s)**

- Information Disclosure Statement(s), PTO-1449, Paper No(s). 1, 4, 6, 9, 13, 16, 19  Interview Summary, PTO-413
- Notice of Reference(s) Cited, PTO-892  Notice of Informal Patent Application, PTO-152
- Notice of Draftsperson's Patent Drawing Review, PTO-948  Other \_\_\_\_\_

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Applicant's election without traverse of Group I, durum wheat, fats, and probiotics in Paper No. 10, 18 are acknowledged.

The election of species requirement over hydrophobic components is withdrawn.

The elected neutral ceutical "Probiotics" is undefined. The term as defined in Stedman's Medical Dictionary 25<sup>Th</sup> ed. Concerns an association of organisms living in a symbiotic relationship.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 25, 27-40, 42, 46, 52, 54-67, 69, 70, 73, 75, 76 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lim et al in view of Schanze.

Lim et al teaches extruded articles comprising cereal grain (abstract), 30-100% is specified (column 3, line 55). Durum wheat is disclosed (column 3, line 43) at 60-90% (column 8, line 37). Extrusion without heating is specified (column 8, lines 45-47); Pellets are specified (column 8, lines 47). Drugs are disclosed (column 9, line 14). Up to 50% Xanthan Gum and poly (vinyl acetate) is specified (column 6 lines 31-32, 37, 40-41). Plasticizers are specified (column 5, line 51 – column 60 line 6).

Schanze teaches lichens as a source of chitins to provide fiber in animal feed (column 11 lines 23-25, 37, column 12 lines, 56-60, 63).

It would have been obvious to one of ordinary skill to add lichens to the composition of Lim et al to achieve the beneficial effect of a fiber in view Schanze.

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As to the particular claimed pellet size and share, it is within the skill in the art to select optimal parameters such as ratios or weight percents of components in order to achieve a beneficial effect. Therefore, the ratios or weight percents instantly claimed are not considered critical absent evidence showing unexpected and superior results.

As to the claimed coating, such is well known in the particle art for purposes such as waterproofing or delayed release.

As to the claimed control of release, such is merely an intended use.

Claims 25, 27-40, 42, 46, 52, 54-67, 69, 70, 73, 75, 76 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

In claims 25, 52 "substantially" are vagues it can mean up to 49% nonhomogeneity. G.W. Bliss v. Cold Metal Process Co. (DC N Ohio) 122 USPQ 238.

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 25, 52 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 21, 104 of

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copending Application No. 09/233443. Although the conflicting claims are not identical, they are not patentably distinct from each other because those of 443 encompass the instant claims.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Edward Webman whose telephone number is (703) 308-4432. The examiner can normally be reached on Monday to Friday 9 AM 5 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, S. Padmanabhan can be reached on (703) 305-1877. The fax phone numbers for the organization where this application or proceeding is assigned are (703) 305-3592 for regular communications and (703) 305-3592 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-1235.

Webman/LR  
February 26, 2003

EDWARD WEBMAN  
FEB 26 2003  
CPE/P (500)